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SECOM-D-468

20 MAR 1979

MEMORANDUM FOR: General Counsel

FROM: Robert W. Gambino
Chairman

SUBJECT: Presentation on the Espionage Statutes

Tony:

1. Please accept my thanks for your thorough and balanced presentation on the Espionage Statutes to the members and staff of the Committee during our recent conference. Your remarks were very helpful in enhancing our understanding of the background of this matter, and of problems and prospects for improving the situation. In the interest of providing conference attendees a record of salient points made on this matter, the attached summary of your presentation has been prepared. Would you please review it and give me your thoughts on its distribution and on any changes needed. Is there a need to classify it?

2. Thank you again for sharing your time and knowledge with us.

Robert W. Gambino

Attachment

Distribution:

Orig - Addressee
1 - C/SECOM
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SECOM [redacted] fh (3/19/79)
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Remarks by Mr. Anthony Lapham, General Counsel, CIA,
on the Espionage Statutes and Related Legal Considerations

Mr. Lapham's remarks were delivered to the DCI Security Committee during its two-day conference in March 1979.

Mr. Lapham advised that the Espionage Statutes trace their history to 1917, and that while there have been some changes since then, the laws are still essentially the same. The basic statutes are sections 793, 794, 798 and 783 of Title 18. He said that in enacting these laws, the Congress does not seem to have intended to criminalize domestic disclosures of classified information which can be contended to have been made to assist in informed public debate on national security issues. Notwithstanding, the words of the statutes seem on their face to prohibit any disclosures. Experience suggests that the intent has prevailed. Mr. Lapham noted that apart from prosecutions for espionage (i.e., cases involving foreign agents or powers), only one case has been brought to trial on the grounds of unauthorized disclosure. This, the Ellsberg-Russo case, was aborted when Judge Byrne, presiding, declared a mistrial following disclosure of a series of Government actions which affected the trial. Mr. Lapham said the subject matter dealt with in that trial was at issue in the Pentagon Papers case which the Government lost in the Supreme Court. He noted that the prior restraint issue central to that case appeared to have enough of a different aspect in the pending case involving the Progressive magazine to suggest a possibly different outcome [this is the case in which the magazine wanted to publish an article on H-bomb construction and operation].

Mr. Lapham said that analysis of the Espionage Statutes was necessarily limited because of the lack of a body of case law on the subject. He noted that the executive branch is not of a single mind on the utility of these laws, with the Justice Department Criminal Division contending that any and all unauthorized disclosures are punishable crimes, while the Intelligence Community argues for stronger statutes. The latter argument, he observed, was often countered by

Justice with the statement that if the Community was just more forthcoming in such matters as declassification of leaked data, the existing system would take care of the problem. Mr. Lapham concluded that this disarray in the Administration makes it unlikely that Congress can be persuaded to enact stronger statutes. He said he sees a slender possibility of the present Congress favorably considering at the most a very narrowly drawn statute which would cover only a relatively small class of information whose sensitivity would be broadly conceded [redacted]

[redacted] He suggested that the more narrow the application of such a proposal, the better the chances of Congress agreeing to extend the penalties to cover publication as well as disclosure. He noted that Congress may also be receptive to changing procedural requirements to make it somewhat easier for the Government to proceed in prosecuting national security cases. He observed that Justice may be coming around to active support of such a change because of their disappointment at having to drop prosecutions in such matters as the [redacted] case because of moves to force disclosure in court of sensitive data. STAT

Mr. Lapham said there is no hope of getting Congress to criminalize the unauthorized disclosure of classified information generally. The reason is that such a statute would upset the political balance by giving the President power to control the availability of information. This would flow from the fact that the classification system is a function of executive authority, and that the President decrees by Executive Order what is and what is not classified. Mr. Lapham said he believed that the statutes should be changed so as to criminalize the passing of any item of classified information to a known foreign agent, without having to show the propriety of the classification or prove damage. He said he viewed this matter as within the purview of basic obligations of citizenship, and that the act of passage apart from procedural issues represented fundamental disloyalty that should be punished by the country which expects its citizens to give it their allegiance and loyalty.

Mr. Lapham noted that the Espionage Statutes differed in their clarity. Section 798, he said, was very clear vis-a-vis the other sections. However, he believes its effectiveness has been a function of its being perceived as a meaningful deterrent, not of its specificity as law. He

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said the only case involving 798 which actually went to trial was the Boyce-Lee one, and in that case the 798 charge was joined with other espionage ones. [Note was taken by one of the members that there had been an earlier case involving 798 which didn't go to trial because the accused entered a plea beforehand] Mr. Lapham said he

He noted that the Office of Legal Counsel in Justice had been reviewing the Espionage Statutes for a year, and that this suggested that not all components of Justice shared the Criminal Division's view that the laws were satisfactory as is. He said he hoped the review would lead to better initiatives in order to, among other things, eliminate the anomalous situation under which a former government employee is for practical purposes safe from prosecution if he leaks sensitive information only to the press and public, and avoids dealings with foreigners.

Mr. Lapham responded to questions on several issues as follows.

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a. The Theft of Government Property statute (section 641) has only been used in espionage cases as an add-on charge, carried along with the basic ones. He said that this charge, by itself, was a weak reed, since the offense was only a misdemeanor if the value of the property was modest, and that proof of the value of disclosed information would probably require open disclosure of a great deal of sensitive data.

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b. Section 783 is not much help in most leak cases because it applies only to current government employees who deal with foreign agents.

c. The 11 questions issue. He believes that the question on declassification of the compromised data cannot be dealt with sensibly before the full circumstances of the case are identified. Hence he considers it irrelevant to insist on an affirmative answer to this question as a condition of opening an investigation. He noted that the Kampiles case was

successfully prosecuted without declassification of the compromised material. He recognized that the FBI has a concern about husbanding its resources and thus has an interest in limiting the number of cases it investigates. With regard to investigation of compromises, he advised that E.O. 12036 was drafted so as to limit the authority of Intelligence Community agencies to investigate leaks themselves, with the understood trade-off being that the FBI would pick up the burden. He noted that the latter didn't materialize.

d. "Lying to an FBI agent" - He noted that section 1001, making it a crime to make a materially false statement to a Federal official in the performance of his duties, appeared to be no longer enforceable as a result of a decision by Judge Gesell several years ago.